

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an Application in terms
of Article 126 of the Constitution.

Waduthanthrige Leo Merril De Alwis,
01, Owittiyawatta,
Kochchikade,
Negombo .

SC (FR) Application No. 710/2012

PETITIONER

Vs.

- 1) K. G. Dharmathilake,
Divisional Secretary,
Divisional Secretariat Office,
Colombo.

- 1 (a). Divisional Secretary,
Divisional Secretariat Office,
Colombo.

- 2) H.D. Anuruddhika,
Accountant,
Divisional Secretariat Office,
Colombo.

- 2 (a). Accountant,
Divisional Secretariat Office,
Colombo.
- 3) Pushpakumara De Silva,
Assistant Commissioner of Excise,
(Western Province)
Excise Commissioner's Office,
D.R.Wijewardena MW,
Colombo 02.
- 3 (a). Assistant Commissioner of Excise,
(Western Province)
Excise Commissioner's Office,
D.R.Wijewardena MW,
Colombo 02.
- 4) Prabhakaran Sandrew,
47 Lakshmi House,
Chaply Colony,
Wadigapitiya,
(via Gampola).
- 5) D.G.M.V Hapuarachchi,
Commissioner General of Excise,
Excise Department,
34, W.A.D. Ramanayake Mw,
Colombo 02.

5 (a). Commissioner General of Excise,
Excise Department,
34, W.A.D. Ramanayake Mw,
Colombo 02.

6) Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENT

**BEFORE : BUWANEKA ALUWIHARE, PC, J.
E.A.G.R. AMARASEKARA, J. &
K.KUMUDINI WICKREMASINGHE, J.**

COUNSEL : R. Arsecularatne PC with Udara Muhandiramge, Punsiri Gamage
and Eranga Yakandawala for the Petitioner.

Viveka Siriwardena PC, ASG for the 1st to 3rd, 5th and 6th
Respondents.

Anura Meddegoda PC with Nadeesha Kannangara and Isuru
Deshapriya for the 4th Respondent.

WRITTEN SUBMISSIONS : By the Petitioners on 09.10.2014
By the 1st, 2nd, 3rd, 5th and 6th Respondents
on 11.09.2014 and 17.02.2022
By the 4th Respondent on 22.08.2014

ARGUED ON : 13.02.2023

DECIDED ON : 13.11.2023

K. KUMUDINI WICKREMASINGHE, J

This is an Application filed under Article 126(1) of the Constitution by the Petitioner seeking, *inter alia*, for a declaration that their fundamental rights to equality before the law and equal protection of the law as guaranteed by Article 12(1) of the Constitution has been violated as a result of the arbitrary, capricious and/or irrational action of the Respondents.

On 12th December 2012, having heard the President's Counsel for the Petitioner in support of this Application and the Learned ASG and the President's Counsel who appeared for the Respondents, this court granted leave to proceed under Article 12(1) of the Constitution for the alleged violation of the said fundamental right by the 1st and 2nd Respondents.

The Petitioner carried on the business of running a toddy tavern at Madampitiya, Colombo 15 and he was awarded the tender to sell toddy at the Madampitiya toddy tavern, Colombo 15 for the period of 01.01.2012 to 31.12.2012. The 1st Respondent who is the Divisional Secretary of Colombo published the Gazette bearing No.1773 on 24.08.2012 (P1) for the sale of the right to sell toddy at the aforesaid toddy tavern for the period starting from 1st January 2013 to 31st of December of 2013 and annually tenders are invited from the prospective bidders in terms of the Gazette No.207 dated 20.08.1982 (P2). The Petitioner in accordance with the aforesaid Gazette submitted a tender for a sum of Rs. 1, 500, 000.00 on 11.09.2012.

The tenders for the sale of the right to sell toddy at the aforesaid toddy tavern was opened on 11.09.2012 and apart from this tender there had been another tender for a sum of Rs. 2, 500, 000.00 submitted by the 4th Respondent. At the opening of the tender, 1st, 2nd and 3rd Respondents, the Clerk of the Colombo Divisional Secretariat, one R.P.G Piyatissa and the Petitioner were present while the 4th Respondent failed to be present.

According to the Petitioner, the 1st Respondent has telephoned the 4th Respondent during the tender board meeting and informed him that the tender will be granted to him. Aggrieved by this the Petitioner has sent a letter (P3) to the 5th Respondent complaining to him about the aforesaid incident and requested that the tender be awarded to him. The 5th Respondent responded by a letter dated 16.11.2012 (P4A) stating that since the 1st Respondent is the Chairman of the Tender Board the 5th Respondent is unable to take any actions against him and advising him to take legal action if any injustice has been caused. Upon receiving this letter the Petitioner has inquired about the same from the Colombo Divisional Secretariat and from the office of the 5th Respondent and he was informed that the tender had been granted to the 4th Respondents.

The Petitioner's position is that the Gazette marked P1 requires the presence of the tenderer at the time of opening the tender and the award of the tender to the 4th Respondent is illegal and unlawful as the 4th Respondent was absent at that specific time.

According to the 4th Respondent he and his father were forcibly taken by some unknown persons to a vehicle (Nissan Vanette Van, White in Colour) parked outside the Divisional Secretariat Office when they were waiting outside the office to be invited to attend the opening of the tender on 11.09.2012 at about 10.00am. The 4th Respondents states that the Petitioner who was not known to him at that time was also inside the said vehicle and they threatened the 4th Respondent and his father to withdraw the tender. Upon the Respondent's refusal to do so, the Petitioner had left the vehicle presumably to attend the tender opening at the Divisional Secretariat Office while the 4th Respondent and his father were detained forcibly to prevent them from attending the same. The 4th Respondent states that those unknown persons threatened to cause

harm if they attempted to leave the vehicle and they were driven away in that vehicle and dropped off in Kiribathgoda.

The 1st Respondent states that he was informed that the handing of the tender closed on the same day which was 11.09.2012 and that the 4th Respondent had been present at that time. Nevertheless, the Petitioner has informed him that the 4th Respondent was not present and that he left the premises since he was not pursuing his tender. The Petitioner has told that the 1st Respondent can talk to the 4th Respondent to confirm the same. Having dialed a number, the Petitioner has given his mobile phone to the 1st Respondent. The 4th Respondent who was at the other end has told the 1st Respondent that the Petitioner had intimidated him and chased him away and yet, he was pursuing his claim for the award of the tender. The 1st Respondent has then announced that the tender will be granted to the 4th Respondent.

According to both the 1st and 4th Respondents, the Gazette marked P1 does not require the presence of the tenderer at the time of opening the tender. The relevant conditions of the Gazette marked P1 in this regard are as follows.

“03. සිලි තබන ලද කවරයක බහාලූ එක එක ටනේඩර්පන ඇතුලත් කවරයෝ උඩ වම පස කලෙවරයේ අංක දරන රා තැබූයම් සඳහා ටනේඩර් පත්රය - කොළඹ ” යනුවෙන් සඳහන් කර - (අ) කොළඹ පරාදයේශීය ලේකම් කාර්යාලයේ ටනේඩර් පවේටයේ තැන්පත් කිරීමෙන්, හෝ (ආ) ලියාපදිංචි තැපෑලෙන් කොළඹ පරාදයේශීය ලේකම් වනෙ එවීමෙන් හෝ මහේ පහන සඳහන් උපලකෙතයේ ඒ ඒ තැබූයමට කලින් දක්වා ඇති වෝලාවන් සහ දිනයන්හි දී හෝ ඊට පරෙ හෝ ලැබෙන්නට සැලැස්විය යුතුය. ටනේඩර් කටුටත් ටනේඩර් භාර ගන්නා අවසාන වෝලාවේ දී කාර්යාලයට පැමිණ සිටිය යුතු ය.

04. තෝරාගත් ටනේඩර් කටු ඒ මොහොතේම ගැනුම්කටු වශයෙන් දැනුම් දෙනු ලබන අතර, ඉහත පල කරන ලද රා රෝන්ද විකිණීමේ කොන්දේසි පරිකාර, වරපරසාද විකිණීමේ කොන්දේසි අත්සන් කිරීම සඳහා නියම කරනු ලබන මුදලක් තැන්පත් ඇටි මුදල වශයෙන් පරාදයේශීය ලේකම් වනෙ ගවේය යුතු ය.”

According to the above, the presence of the tenderers are required only when they are closing the acceptance of tenders and not at the time of the opening of the tenders.

Further, the condition 07 of the said Gazette marked P1 states that,

“කිසි කුඳුණක් නොදක්වාම එකක් හෝ සියලුම ටෙන්ඩර් පිරිනික්මාපෝස කිරීමේ බලය පරාදෝශීය ලෝකමිට තිබේ.”

The condition 9 of the Gazette marked P2 also states that,

“The Powers of Acceptance or Rejection of Tenders-

(1) The Government Agent may, in his discretion, accept any tender received.

(2) The Government Agent may, in his discretion, reject any or all of the tenders received...”

It is evident from the above that the complete discretion over the tender lies with the Divisional Secretary. In the present case, the 1st Respondent who is the Divisional Secretary has awarded the tender to the 4th Respondent by considering the fact that the tender submitted by him was Rs. 300, 000.00 in excess of the threshold price fixed by the Excise Department (Rs. 2, 200, 000.00) while the tender of the Petitioner fell short of the threshold price by Rs. 700, 000.00.

Therefore, the actions of the 1st Respondent cannot be considered as arbitrary and unlawful as he has acted according to the Gazette in the best interest of the State.

Furthermore, the Respondents of the present action have contended that the Petitioner’s application has been filed out of time. Although this court has

decided on 21.12.2012 that the application was filed within the mandatory time limit of one month, this cannot be taken as conclusive as the case was supported *ex parte* on that day without notice to any of the Respondents. By the journal entry dated 01.07.2014, this court has granted permission to the Respondents to file preliminary objections on time bar before 08.08.2014 and on 19.08.2014, this court has granted further two weeks time to the 4th Respondent to file written submission on the preliminary objections. The 4th Respondent has filed his written submission on 22.08.2014 and 1st, 2nd, 3rd, 5th and 6th Respondents have filed their written submissions on 11.09.2014. In all of those submissions, the Respondents have raised the preliminary objection that the Petitioner's application has been filed out of time under Article 126 (2) of the Constitution and therefore, the matter must be dismissed *in limine*. According to Article 126 (2) of the Constitution,

*“Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an Attorney-at-Law on his behalf, **within one month thereof**, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two judges.”*

In the case of **Ilangaratne vs. Kandy Municipal Council [1995] BALJ Vol.VI Part 1** at p.10, his Lordship Justice Kulatunga observed that,

“the result of the express stipulation of a one month time limit in Article 126(2) is that, this Court has no jurisdiction to entertain an application which is filed out of time – ie: after the expiry of one month from the occurrence of the alleged infringement or imminent infringement which is complained of,. if it is clear

that an application is out of time, the Court has no jurisdiction to entertain such application.”

In **Demuni Sriyani de Soyza and others v. Dharmasena Dissanayake, SC 206/2008 (F/R), SC Minutes of 09.12.2016**, Justice Prasanna Jayawardena PC held at page 8 that,

“Article 126 (2) of the Constitution stipulates that, a person who alleges that any of his fundamental rights have been infringed or are about to be infringed by executive or administrative action may “..... within one month thereof “ apply to this Court by way of a Petition praying for relief or redress in respect of such infringement. The consequence of this stipulation in Article 126 (2) is that, a Petition which is filed after the expiry of a period of one month from the time the alleged infringement occurred, will be time barred and unmaintainable. This rule is so well known that it hardly needs to be stated here.

The rule that, an application under Article 126 which has not been filed within one month of the occurrence of the alleged infringement will make that application unmaintainable, has been enunciated time and again from the time this Court exercised the Fundamental Rights jurisdiction conferred upon it by the 1978 Constitution.”

In the present case, the 1st Respondent has announced his decision to award the tender to the 4th Respondent on the day the Tenders were open, which was on 11.09.2012 in the presence of everyone, including the Petitioner. Subsequently, the Petitioner on 13.09.2012 has written a letter (marked P3) to the 5th Respondent complaining about the incident and requesting to grant the tender to him.

The Petitioner’s position is that he became aware of the granting of the tender to 4th Respondent only when he received the letter marked P4 on 20.11.2012

in reply to his letter marked P3. However, in the said letter marked P3 supports the position of the Respondent that the Petitioner was aware of the said decision.

Moreover, clause 10 of the Gazette marked P1 states that if the toddy tender in question was not awarded on 11.09.2012, the tender will be resold on 06.11.2012 at 10.30 am. Nevertheless, there were no steps taken for resale of the impugned toddy tender on the said date. This further affirms that the tender was already awarded to the 4th Respondent on 11.09.2012 and even if the Petitioner was not aware of that on 11.09.2012, he should have been aware by 06.11.2012 as there was no resale as stipulated by the said Gazette.

However, the Petitioner has filed this application on 20.12.2012 after the expiry of one month (which is more than three months after the alleged violation).

Furthermore, in **Siriwardena and Others v. Brigadier J. Rodrigo and Others (1986) 1 Sri.L.R. 384**, Justice Ranasinghe held at page 385 that,

“An application must be filed within one month from the date of the commission of the administrative or executive act which is alleged constitutes the infringement or imminent infringement of the fundamental right relied on. Where, however, a petitioner establishes he became aware of such infringement or imminent infringement only on a later date, the one month will run from that date. The petitioners had filed their application long after the expiry of one month from the date they became aware of the infringement. Hence the application was out of time.”

Similarly, in **Gamaethige v. Siriwardena and Others (1988) 1 Sri.L.R. 384**, where the Petitioner has sent letters to the Director of Establishments and the Secretary of the Ministry of Public Administration complaining about the violation of his fundamental rights, it was held at page 402 that,

*“Three principles are thus discernible in regard to the operation of the time limit prescribed by Article 126 (2). Time begins to run when the infringement takes place; if knowledge on the part of the petitioner is required (e.g of other instances by comparison with which the treatment meted out to him becomes discriminatory), time begins to run only when both in infringement and knowledge exist (Siriwardena v. Rodrigo (2). **The pursuit of other remedies, judicial or administrative, does not prevent or interrupt the operation of the time limit.**” [emphasis added]*

According to afore-cited cases, the Petitioner seeking an administrative remedy by writing to the 5th Respondent does not stop the running of time as stipulated in Article 126 (2) of the Constitution. Therefore, I am of the opinion that the application of the Petitioner is time barred as it was filed on 20.12.2012 which is more than three months after the alleged violation.

For the reasons set out above, I conclude that the Petitioners application is time barred under Article 126 (2) of the Constitution thus, the same is misconceived in law

On the basis of the aforesaid findings, the Application is hereby dismissed.

JUDGE OF THE SUPREME COURT

BUWANEKA ALUWIHARE, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

E.A.G.R. AMARASEKARA, J.

I agree.

JUDGE OF THE SUPREME COURT